

The EEOC Mediation Program: Panacea or Panicked Reaction?

MATTHEW A. SWENDIMAN

I. INTRODUCTION

In February 1999, United States Equal Employment Opportunity Commission (EEOC) Chairwoman Ida Castro addressed the media and announced an exciting initiative: the expansion of the EEOC Mediation Program.¹ She noted that “[w]hat EEOC has learned is that matters resolved through voluntary mediation result in win-win outcomes for employers and employees alike.”² Ms. Castro added: “Mediation is a fair and efficient voluntary mechanism to resolve employee/employer discrimination issues to the satisfaction of both parties, preventing undue delays and bringing matters to closure quickly and fairly.”³ The increased use of mediation would provide employers and employees another option for resolving disputes, and perhaps of equal importance, would provide heightened efficiency at the EEOC.

The EEOC enforces many of the most important civil rights statutes in the United States, including “the principal federal statutes prohibiting employment discrimination.”⁴ Because most adult Americans are employed,⁵ disputes between employees and employers are amongst the most numerous and important disputes considered by federal governmental agencies, in

¹ THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC TO LAUNCH MAJOR EXPANSION OF ITS MEDIATION PROGRAM, at <http://www.eeoc.gov/press/2-9-99.html> (last modified Feb. 9, 1999) (on file with the Ohio State Journal on Dispute Resolution) [hereinafter MAJOR EXPANSION].

² *Id.*

³ *Id.*

⁴ THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: AN OVERVIEW, at <http://www.eeoc.gov/overview.html> (last modified Nov. 3, 1997) (on file with the Ohio State Journal on Dispute Resolution) [hereinafter AN OVERVIEW]. A sample of such statutes include: Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act of 1967, as amended, the Equal Pay Act of 1963, the Title I of the Americans with Disabilities Act of 1990, the Civil Rights Act of 1991, and Section 501 of the Rehabilitation Act of 1973. *Id.*; MAJOR EXPANSION, *supra* note 1. With this broad array of responsibilities, there is little wonder that the EEOC backlog became unmanageable.

⁵ The unemployment rate for the United States in December 1999 was 4.1%. THE U.S. BUREAU OF LABOR STATISTICS, THE EMPLOYMENT SITUATION: DECEMBER 1999, at http://www.bls.census.gov/cps/pub/empstat_1299.htm (Jan. 7, 2000).

particular, the EEOC.⁶ Traditionally, the EEOC has utilized litigation or an investigative process to solve employment conflicts.⁷ This Note will consider why the EEOC has chosen to place an impetus upon mediation.

Prior to Ms. Castro's appointment as Chairwoman, the EEOC was effectively paralyzed. A massive backlog of cases, coupled with the uncertain status of high-level management and budget constraints, had brought the Commission to the brink of disaster.⁸ Management was stabilized following Ms. Castro's appointment as Chairwoman in October 1998,⁹ but proactive steps were required to reduce the stifling inventory of cases.¹⁰ Mediation and alternative dispute resolution (ADR) were seen as ways to alleviate the backlog of unheard cases.¹¹ The increased use of mediation, however, has raised two major concerns: First, some parties contend that mediation cannot adequately resolve the challenging issues considered by the EEOC.¹² Also, an increased use of mediation necessarily

⁶ See *infra* notes 8, 11 and accompanying text.

⁷ Nancy Montwieler, *EEOC's New Nationwide Mediation Plan Offers Option of Informal Settlements*, 29 Daily Lab. Rep. (BNA), at C-1 (Feb. 12, 1999) [hereinafter *New Nationwide*].

⁸ Darryl Van Duch, *Paralysis for EEOC Feared*, THE NAT'L L.J., Aug. 24, 1998, at A1, A21 [hereinafter *EEOC Feared*]. For example, a panel of five commissioners presides over the EEOC. For continued operation, a quorum of three commissioners must approve policy; however, in August 1998 (prior to Ms. Castro's appointment), only three commissioners were active. EEOC commissioners are appointed to five-year, staggered terms. Two commissioners' terms had expired and the posts had not been filled. *Id.* Additionally, the backlog of cases in 1998 numbered nearly 60,000, and many sympathizers have argued that the EEOC's budget (then \$242 million) was grossly inadequate to handle 80,000 employment discrimination claims yearly. *Id.*

⁹ THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, IDA L. CASTRO TAKES OATH AS EEOC CHAIRWOMAN, at <http://www.eeoc.gov/press/10-23-98.html> (Oct. 23, 1998). Castro replaced Acting EEOC Chairman Paul M. Igasaki, who stood in, following the resignation of Gilbert F. Casellas, at the end of 1997. *Id.*; see also *EEOC Feared*, *supra* note 8, at A1.

¹⁰ See MAJOR EXPANSION, *supra* note 1 and accompanying text; *EEOC Feared*, *supra* note 8 and accompanying text.

¹¹ Darryl Van Duch, *EEOC Looks to More Mediation*, THE NAT'L L.J., Mar. 15, 1999, at B5 [hereinafter *More Mediation*]. In 1995, the EEOC case backlog totaled 111,000 cases. *Id.* That number had been reduced, largely as a result of streamlined procedures and modernized management techniques, to 52,000 in March 1999. *Id.* Chairwoman Castro stated that 8,000 cases had been successfully mediated in Fiscal Year (FY) 1998. *Id.* Additionally, Castro claimed that the number of successfully mediated cases could reach 10,000 in FY 1999, helping to quadruple the number of employment discrimination cases the EEOC settles. *Id.*

¹² For example, in a roundtable discussion of several New Jersey employment lawyers, one attorney questioned the EEOC's application of mediation:

requires a budgetary increase to provide additional staffing and resources.¹³ These problems threaten the continued existence of the EEOC Mediation Program.

This Note proposes to review carefully the processes that led the EEOC to embrace ADR as a viable alternative in resolving employment discrimination disputes, and questions whether mediation can adequately address the various interests of all parties. Part II of this Note will review the traditional methods of dispute resolution employed by the EEOC, the limitations of those methods, and explain why mediation is seen as a possible solution to the inefficiencies of the past. Part III will explore the history of the EEOC Mediation Program, from infancy to recent expansion. Part IV will consider the relative advantages and disadvantages of ADR in the EEOC process. In particular, it will discuss the concerns of civil rights activists. Part V will discuss the budgetary hardships that continue to threaten the Mediation Program. Finally, this Note will conclude with a reflection upon the results of the Mediation Program's first year since expansion, and with a look to the future.

II. THE EEOC TRADITION: LITIGATION AND INVESTIGATION

This Part will consider the traditional methods of dispute resolution employed by the EEOC to resolve charges of employment discrimination. Additionally, it will consider the relative benefits and disadvantages of these methods. Finally, it will discuss the value of mediation as a supplement to the present methods of resolution.

Before Chairwoman Castro announced the expansion of the EEOC Mediation Program,¹⁴ the EEOC typically employed two methods to resolve

What they're [EEOC] using it for, basically, is to settle 90 percent of the frivolous cases to get something for the plaintiff Because whatever happens with the Equal Employment Opportunity Commission, whether there's a finding of cause or not, you get a right to sue later. It's [an] unfair pressure tactic that the system creates . . . which does encourage mediation

Managing in the Millennium: Prospects for the Law Profession: Today, Tomorrow, and Far Beyond, N.J. LAW., Jan. 3, 2000, at 8 [hereinafter *Managing in the Millennium*]; see also *infra* Part IV.B.

¹³ In Fiscal Year 1999, Congress appropriated to the EEOC \$13 million specifically for the Mediation Program. Jared D. Simmer, *The EEOC Launches a New Nationwide Mediation Program*, 1 (10) LAW. J. 6 (Aug. 13, 1999). Recently, however, budgetary concerns have led to a reduction by one-half of the Mediation Program's scope. L.M. Sixel, *High Costs Force EEOC to Cut Back Mediation Project*, HOUS. CHRON., Feb. 15, 2000, at 1; see also *infra* Part V.

¹⁴ MAJOR EXPANSION, *supra* note 1.

employment disputes: investigation and litigation.¹⁵ These processes stem from each other; a discrimination charge brought by an individual triggers an investigative process.¹⁶ Initially, all discrimination charges brought by individuals are placed into one of three categories to facilitate investigation and resource allocation.¹⁷ The categorization effort, though well intentioned, accounts for the initial reduction in the backlog of cases seen since 1995.¹⁸ If the EEOC determines during the investigative process that there is "reasonable cause" to believe discrimination has occurred, conciliation between the charging party and the respondent is sought.¹⁹ Should the parties remain at an impasse, litigation may ensue.²⁰

The EEOC may choose to bring suit on behalf of the charging individual in federal court.²¹ Recent litigation efforts by the EEOC do demonstrate effective advocacy.²² For example, in fiscal year (FY) 1996, the EEOC obtained over \$50 million in monetary benefits for discrimination victims.²³

¹⁵ AN OVERVIEW, *supra* note 4.

¹⁶ *Id.*; see also *infra* notes 17–20 and accompanying text.

¹⁷ *Id.* "Category A" charges are priority charges to which the offices devote principal investigative and settlement efforts. "Category B" charges are those which appear to possess some merit but require additional investigation before a handling decision is made. "Category C" charges include non-jurisdictional, self-defeating, or unsupported charges that are immediately closed. *Id.*

¹⁸ *More Mediation*, *supra* note 11, at B5.

¹⁹ AN OVERVIEW, *supra* note 4.

²⁰ *Id.*

²¹ *Id.* Not only may the EEOC bring suit on behalf of the individual, but whenever the EEOC completes the processing of a case, or earlier, if the charging party requests, the EEOC issues a "notice of right to sue" which enables the charging party to bring an individual action in court. *Id.*

²² The EEOC undeniably has had much litigation success. This success, however, as mentioned, requires a great deal of human capital and leads to case backlogs. Recent EEOC litigation achievements include a \$13 million settlement with Lockheed Martin (as well as reinstatement for 450 workers) in an age bias suit, a \$34 million settlement in a sexual harassment case involving Mitsubishi Motors Manufacturing, and a \$10 million sexual harassment settlement with Astra USA, Inc. *Id.* These figures represent the EEOC's largest sexual harassment settlements to date. *Id.* Of additional note, Mitsubishi adopted extensive changes to its sexual harassment policy, and Astra issued formal apologies to the women involved in said suit. *Id.* Furthermore, recent jury awards facilitated by the EEOC include a \$5.5 million verdict for an individual discharged for being an epileptic. *Id.* Also, \$3.5 million was awarded to a paraplegic job applicant denied assistance, as there were "no openings for a person in a wheelchair." *Id.* Massive awards and sweeping, influential changes in behavior demonstrate the effectiveness of litigation as a tactic wielded by the EEOC.

²³ *Id.*

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In FY 1997, that figure rose to \$111 million, and in FY 1998, \$90 million was recovered for victims of discrimination.²⁴ Meanwhile, the EEOC also filed 70 *amicus curiae* briefs during 1998;²⁵ unquestionably, the litigation efforts of the EEOC were effective. The dogged efforts of the Commission to eliminate employment discrimination, however, led to the staggering backlog previously mentioned.

Litigation possesses other shortcomings when used to resolve employment discrimination disputes. Litigation and investigation are expensive. For FY 1998, the EEOC budget appropriation was \$242 million.²⁶ Ninety percent of that total is applied to salaries, benefits, and rents; the personnel-intensive nature of investigation and litigation requires remarkable outlays of labor and economic resources.²⁷ In contrast, the expanded use of mediation may reduce the case backlog and have the ancillary effect of reducing the EEOC budgetary burden.

Time is another expense of investigation and litigation. On average, a discrimination charge processed traditionally by the EEOC takes 310 days to resolve.²⁸ Conversely, Chairwoman Castro claimed in February 1999 that

²⁴ *Id.*

²⁵ *Id.* Amongst the *amicus curiae* briefs filed by the EEOC since the beginning of 1998, several have reached the Supreme Court of the United States. These include: *Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999) (supporting Respondent's effort to waive federal visual acuity requirement as an OTR truck driver in light of ADA); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (advocating Petitioner's attempt to invoke the ADA when Respondent was denied employment because of severe, but correctable, visual myopia); *Murphy v. United Parcel Service*, 527 U.S. 516 (1999) (supporting Petitioner's unsuccessful challenge that the ADA should apply to an individual with hypertension, regardless of mitigation of symptoms by medication); *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999) (supporting Petitioner's request for punitive damages against "in egregious" discrimination by employer in Title VII dispute); *Wright v. Universal Maritime Corp.*, 525 U.S. 70 (1998) (supporting Petitioner's effort to circumvent a mandatory arbitration agreement found within collective bargaining agreement); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (supporting Respondent's right to compensation from employer for sexual harassment by supervisor under Title VII without proof of employer's negligence or knowledge).

²⁶ AN OVERVIEW, *supra* note 4. For FY 1999, Congress approved the President's budget request of \$279 million. *Id.* According to the Office of Management and Budget, the proposed budgetary allowance for the EEOC for FY 2000 is \$312 million. THE U.S. OFFICE OF MGMT. AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2000, at <http://w3.access.gpo.gov/usbudget/fy2000/pdf/budget.pdf> (last visited Feb.15, 2001), at 137 [hereinafter BUDGET].

²⁷ AN OVERVIEW, *supra* note 4.

²⁸ *New Nationwide*, *supra* note 7, at C-1.

charges referred to mediation were completed on average in six months.²⁹ Chairwoman Castro, in fact, has stressed that mediation is faster and more economical than the traditional charge-processing approach.³⁰ Certainly, reduction of these costs is a benefit of the mediation expansion.

Perhaps the most costly effect of litigation is the strain placed upon relationships, particularly employer/employee interactions that may have to continue.³¹ Litigation is an adversarial process.³² A successful mediation, however, may preserve the fragile employment relationship, as settlement agreements secured during mediation do not constitute an admission by the employer of any violation of the laws enforced by the EEOC.³³ Mediation, therefore, may be the most appropriate method of resolution if an employee wishes to retain a working relationship.

Again, while litigation and investigation have been the EEOC's traditional methods of dispute resolution for charges of employment discrimination, mediation is more efficient and less expensive.³⁴ Also of real importance in the employment sector, mediation allows tenuous relationships to be retained and strengthened.³⁵ Mediation, therefore, appears a keen tool for future EEOC enforcement efforts.

²⁹ *Id.* According to Elizabeth Thornton, director of the EEOC's Office of Field Operations, by October 1999, a charge referred to mediation was completed on average in only 87 days. Nancy Montwieler, *EEOC's Voluntary Mediation Program Is Now Integral Tool in Enforcement Arsenal*, 68 U.S.L.W. (BNA) 2184 (Oct. 5, 1999), [hereinafter *Integral Tool*]. In fact, the average EEOC mediation session only lasts 3.6 hours. Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 598 (citing Craig A. McEwen, *An Evaluation of the Equal Employment Opportunity Commission's Pilot Mediation Program 4-5* (Mar. 1994) (unpublished manuscript, on file with author)).

³⁰ *New Nationwide*, *supra* note 7, at C-1.

³¹ Cf. Jonathan R. Harkavy, *Privatizing Workplace Justice: The Advent of Mediation in Resolving Sexual Harassment Disputes*, 34 WAKE FOREST L. REV. 135, 157 (claiming that mediation provides a substantial advantage over litigation in sexual harassment disputes where "intimacies and degradations would likely be revealed for public consumption and consequent personal embarrassment"). Also, mediation "emphasizes a non-adversarial exploration of the parties' common interests and personal concerns, thereby making it far less likely that the employment relationship becomes irreparably fractured." *Id.* at 160.

³² HENRY J. BROWN & ARTHUR L. MARRIOTT, *ADR PRINCIPLES AND PRACTICE* 23 (1993).

³³ THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *FACTS ABOUT MEDIATION*, at <http://www.eeoc.gov/mediate/history.html> (last modified Feb. 11, 1999).

³⁴ See *supra* notes 14-30 and accompanying text.

³⁵ See *supra* notes 31-33 and accompanying text.

III. HISTORY OF THE EEOC MEDIATION PROGRAM

This part will review briefly the history of the EEOC Mediation Program. Considered progressive in the early 1990s, mediation and ADR have become a major portion of the EEOC enforcement arsenal. A brief review, beginning with the EEOC pilot Mediation Program, leading to an examination of the widespread use of ADR throughout the EEOC, will demonstrate the scope of this change.

A. *The EEOC Pilot Mediation Program*

In 1991, the EEOC experimented with a pilot Mediation Program in four field offices.³⁶ During the introductory period, fifty-two percent of the charges submitted to mediation were resolved.³⁷ This success led to the establishment of a Task Force on Dispute Resolution in April 1995.³⁸ The Task Force reported that ADR was a viable and effective method of resolving employment discrimination disputes, and recommended full implementation of a Mediation Program.³⁹ Soon thereafter, in July 1995, a policy statement was produced.⁴⁰ The policy statement provided a laundry list of requirements seen as crucial to the implementation and continued success of any proposed program.⁴¹

³⁶ THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, HISTORY OF THE EEOC MEDIATION PROGRAM, at <http://www.eeoc.gov/mediate/history.html> (last modified Feb. 11, 1999) [hereinafter EEOC MEDIATION PROGRAM]. The four field offices participating in the pilot program were Philadelphia, New Orleans, Houston and the Washington Field Office. *Id.*

³⁷ MAJOR EXPANSION, *supra* note 1.

³⁸ *Id.* The Task Force recommendations were crafted following extensive discussions with agency stakeholders, ADR experts, and veteran EEOC staff. *Id.*

³⁹ EEOC MEDIATION PROGRAM, *supra* note 36.

⁴⁰ MAJOR EXPANSION, *supra* note 1. The core principles provided that any proposed or implemented alternative dispute resolution program must above all else further the EEOC's mission. *Id.* The mission of the commission is "to promote equal opportunity in employment through administrative and judicial enforcement of the federal civil rights laws and through education and technical assistance." AN OVERVIEW, *supra* note 4. Additionally, any ADR program must be fair, advocate voluntariness, neutrality, confidentiality, and must be enforceable. EEOC MEDIATION PROGRAM, *supra* note 36. Furthermore, any such program must recognize the differing circumstances that exist in the various district offices and be flexible enough to account for this variety as well as shifting priorities and changing caseloads. *Id.* Finally, adequate training and evaluative components were considered crucial. *Id.*

⁴¹ MAJOR EXPANSION, *supra* note 1.

B. Mediation Becomes Mainstream

While the Task Force on ADR supported the use of mediation, legislative and economic realities slowed the implementation of a large-scale ADR program. The Administrative Dispute Resolution Act (ADRA)⁴² expired in September 1995, restraining the use of pro bono mediators as staff.⁴³ With the reauthorization of the ADRA in October 1996, several district offices supplemented their staffs with volunteer mediators.⁴⁴ By October 1997, every district office had instituted and operated a Mediation Program, many with the assistance of local mediation services.⁴⁵ Even without specific Congressional funding, the EEOC was able to mediate many cases before the program's expansion.⁴⁶ In fact, in FY 1997, \$10.8 million in monetary benefits for victims of employment discrimination was reaped.⁴⁷ In FY 1998, that figure leapt to \$17 million.⁴⁸ In response to the rapid growth of ADR as an enforcement tool, the EEOC budget for FY 1999 was increased by \$37 million, with \$13 million specifically allocated for the Mediation Program expansion.⁴⁹ The Mediation Program, with increased funding and the growing support of the EEOC, had arrived.⁵⁰

⁴² 5 U.S.C. § 571 (1994 & Supp. 2000).

⁴³ MAJOR EXPANSION, *supra* note 1.

⁴⁴ EEOC MEDIATION PROGRAM, *supra* note 36. With the expanded Mediation Program, the need for pro bono mediators has become more acute. On March 26, 1999, Chairwoman Castro announced a pilot program to use volunteer mediators in greater numbers to augment the staff already in place. Three district offices, in Chicago, Cleveland, and New York City, participated in the pilot program. Castro stressed her belief that the program would be expanded to other district offices in the near future. Nancy Montwieler, *Commission to Use Pro Bono Lawyers for Mediation Program in Three Cities*, 59 Daily Lab. Rep. (BNA), at C-1 (Mar. 29, 1999); *see also* Washington Brief: *EEOC Pro Bono Pilot*, THE NAT'L L.J., Apr. 19, 1999, at A9.

⁴⁵ EEOC MEDIATION PROGRAM, *supra* note 36.

⁴⁶ *Id.*

⁴⁷ THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, MEDIATION: A NATIONAL CALL TO ACTION: GENERAL INFORMATION FACT SHEET, at <http://www.eeoc.gov/mediate/press-facts.html> (last modified Mar. 15, 1999) [hereinafter NATIONAL CALL].

⁴⁸ *Id.* In FY 1997, 830 mediated resolutions were completed fetching the aforementioned \$10.8 million on behalf of 780 individuals. *Id.* In FY 1998, approximately 1,600 individuals benefited from 1,631 mediated resolutions, recovering \$17 million. *Id.*

⁴⁹ *Id.* In a year-end address, Chairwoman Castro reported 4,833 charges had been mediated in FY 1999, with a settlement success rate of sixty-five percent. THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC ACCOMPLISHMENTS REPORT

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While the Mediation Program grew at the EEOC, some parties, in particular employers, remained hesitant to employ the new technique.⁵¹ The same companies that were initially resistant, however, have become supportive converts.⁵² When employers “saw how quickly and inexpensively a case could be settled, they became true believers . . . and are now among [the EEOC’s] Mediation Program’s best supporters.”⁵³ In fact, in October 1999, the EEOC reported that 36% of employers and 81% of charging parties who are offered the option of mediation agreed to engage in the process.⁵⁴

In part, however, the EEOC itself may be to blame for employers’ hesitant employment of mediation. For example, in December 1998, the Houston District Office announced a \$1 million mediation settlement.⁵⁵ With large settlements stemming from the mediation process, employers may wish to take their chances with litigation.

FOR FISCAL YEAR 1999, at <http://www.eeoc.gov/accomplishments-99.html> (last modified Jan. 18, 1999).

⁵⁰ A recent study of the EEOC Mediation Program reported very high satisfaction rates by participants. Ninety-two percent of participants found the process fair, and sixty-nine percent were very or somewhat satisfied with the outcome. Additionally, eighty-four percent of all participants agreed strongly that they would employ mediation again if faced with a similar problem in the future. Yelnosky, *supra* note 29, at 603.

⁵¹ Prior to the expansion of the EEOC Mediation Program, employers were loath to participate. In an interview, Chairwoman Castro admitted that building employer support was vital for the continued successful use of ADR. As of March 1999, longstanding skepticism about ADR by corporations and the defense bar has resulted in seventy percent of employers opposing the use of mediation in cases handled by the EEOC. *More Mediation*, *supra* note 11, at B5; see also *New Nationwide*, *supra* note 7, at C-1.

⁵² Brown & Root became convinced that mediation was an acceptable and attractive alternative to litigation after spending \$400,000 in legal fees to successfully defend an employment discrimination suit. Yelnosky, *supra* note 29, at n.90 (citing UNITED STATES GENERAL ACCOUNTING OFFICE, *ALTERNATIVE DISPUTE RESOLUTION: EMPLOYER’S EXPERIENCES WITH ADR IN THE WORKPLACE* (1997)). However, Brown & Root admitted costs have remained static because the number of settlements have increased. *Id.* at n.105.

⁵³ *More Mediation*, *supra* note 11, at B5 (quoting Chairwoman Castro).

⁵⁴ *Integral Tool*, *supra* note 29, at 2184.

⁵⁵ NATIONAL CALL, *supra* note 47. The class-action case originated in Port Arthur, Texas, and involved African American, Hispanic, and American Indian employees who alleged discrimination in pay, promotions, and discipline at the local Fina refinery. In another mediated resolution, also in December 1998, the Milwaukee District Office successfully mediated a sexual harassment dispute involving a Denny’s restaurant located in Waukesha, Wisconsin. The settlement terms included monetary damages for female servers, and sexual harassment training for store managers in the Waukesha area. *Id.*

From humble beginnings, mediation has become a large component of the EEOC Comprehensive Enforcement Program (CEP).⁵⁶ Is mediation, however, really the proper method for the enforcement of employment discrimination statutes? In addition to the hesitant employers mentioned above, many activists believe ADR does not effectively protect the civil rights of individuals historically subject to discrimination. The next part will consider this question.

IV. ADR AND CIVIL RIGHTS: CAUSE FOR CONCERN?

This Note has described the mercurial growth of ADR as an enforcement weapon for the EEOC.⁵⁷ Unequivocally, mediation eases the backlog of cases and aides in efficient resolution of employment discrimination charges.⁵⁸ How is this accomplished? The following part discusses mediation as a dispute resolution technique, particularly as employed by the EEOC program, and addresses the notion that mediation may compromise or inadequately protect some individual's rights.

A. Mediation and ADR Techniques: The EEOC Mediation Program

There are four key elements to mediation. The mediation must be voluntary, non-binding, without prejudice, and confidential.⁵⁹ The EEOC Mediation Program is traditional, embracing each element.⁶⁰ The program is completely voluntary; an EEOC representative contacts the parties concerning their participation.⁶¹ If either party declines to mediate, the

⁵⁶ In fact, "President Clinton's message accompanying the [FY 1999] budget bill's approval referred explicitly to the EEOC's adoption of mediation as the preferred method of resolving discrimination charges." Harkavy, *supra* note 31, at 155 (citing 34 Fair Empl. Prac. (BNA) 127 (Dec. 11, 1998)).

⁵⁷ See *supra* Part III (discussing the growth of the EEOC Mediation Program).

⁵⁸ See *supra* note 11 and accompanying text.

⁵⁹ ALEXANDER BEVAN, ALTERNATIVE DISPUTE RESOLUTION 27 (1992).

⁶⁰ THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, QUESTIONS AND ANSWERS ABOUT MEDIATION, at <http://www.eeoc.gov/mediate/qanda.html> (last visited Aug. 15, 2000) [hereinafter QUESTIONS AND ANSWERS].

⁶¹ See *id.* Voluntariness, however, is not universally valued. One labor attorney decries voluntary mediation because "so few cases are diverted to mediation." Captain Drew Swank, *Mediation and the Equal Employment Opportunity Complaint Process*, ARMY LAW., Sept. 1998, at 47. The attorney suggests alternatively a standardized mediation program by which every dispute would be mediated prior to the complaint. *Id.*

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charge is forwarded for investigation.⁶² Likewise, a party may choose to participate, but is not bound to reach an agreement.⁶³ If an agreement is reached between the parties during mediation, that agreement is enforceable in court like any settlement agreement filed with the EEOC.⁶⁴ Finally, the mediation session is confidential.⁶⁵ Statements made during the mediation do not prejudice any later investigations, nor may statements made during the mediation session be used in any other venue (*e.g.*, litigation).⁶⁶ The mediation process succeeds because "the process aims to put back in the hands of the parties responsibility for the outcome."⁶⁷ The process would fail, however, without a skilled mediator.⁶⁸

The EEOC employs a staff of trained mediators, and until recently, augmented this group with external staff and pro bono assistance.⁶⁹ Each

⁶² QUESTIONS AND ANSWERS, *supra* note 60; *see also Integral Tool*, *supra* note 29, at 2184 (noting only 36% of employers choose to participate in mediation).

⁶³ *See* QUESTIONS AND ANSWERS, *supra* note 60. "If a charge is not resolved during the mediation process, the charge is returned to an investigative unit . . ." *Id.* In fact, during FY 1999, 2,597 cases that went to mediation reached an impasse, and were returned for alternate resolution. Telephone Interview with Loretta Feller, ADR Coordinator, Cleveland District Office of the United States Equal Employment Opportunity Commission (Dec. 8, 1999).

⁶⁴ QUESTIONS AND ANSWERS, *supra* note 60.

⁶⁵ *Equal Employment Opportunity Commission Mediation Program*, 29 Daily Lab. Rep. (BNA), at E-20 (Feb. 12, 1999). "Information disclosed during mediation will not be revealed to anyone . . . including other EEOC employees." *Id.*

⁶⁶ *Id.* Confidentiality is vital to the success of any mediation, and the EEOC takes extreme measures to ensure privacy.

The mediator and the parties must sign agreements that they will keep everything that is revealed during the mediation confidential. The mediation sessions are not tape-recorded or transcribed. Notes taken during the mediation are destroyed. Any records or other documents offered by either party during the mediation are also destroyed. Furthermore, in order to ensure confidentiality, the Mediation Program is insulated from the EEOC's investigative and litigation functions. EEOC mediators only mediate charges. They are precluded from performing any other functions related to the investigation or litigation of charges.

QUESTIONS AND ANSWERS, *supra* note 60.

⁶⁷ BEVAN, *supra* note 59, at 18.

⁶⁸ L. Camille Hébert, *Establishing and Evaluating a Workplace Mediation Pilot Project: An Ohio Case Study*, 14 OHIO ST. J. ON DISP. RESOL. 415, 450 (1999) ("Parties participating in the mediation process are likely to form their conclusions about the utility of the mediation in general and of the Mediation Program in particular from their experiences with the mediator or mediators of the dispute, particularly if those parties have not had prior experience with mediation.").

⁶⁹ *See infra* Part V (discussing elimination of external mediators from EEOC Mediation Program as a result of recent budget cuts).

mediator is uniquely qualified to facilitate employment discrimination disputes.⁷⁰ Regardless of the mediator's skill, however, many activists remain concerned about potential civil rights infringement.⁷¹ These concerns, coupled with employers' hesitance to employ mediation, continue to place the effectiveness of the EEOC Mediation Program into question.

B. Civil Rights Activists React

When the expanded EEOC Mediation Program was announced in February 1999, Chairwoman Castro faced a daunting task. Meeting with members of the defense bar, employees, employers' representatives, civil rights activists, and others, Castro pitched the advantages of the program.⁷² Previously, this Note has discussed the hesitance of employers to embrace the Mediation Program.⁷³ Civil rights groups, however, have also been reluctant to endorse the program's expansion.⁷⁴

Civil rights advocates cite the lack of community outreach to historically disadvantaged groups by the EEOC as a continuing concern.⁷⁵ Likewise,

⁷⁰ QUESTIONS AND ANSWERS, *supra* note 60.

Only mediators who are experienced and trained in mediation and equal employment opportunity law are assigned to mediate EEOC charges. EEOC has a staff of trained mediators. [The EEOC] also contract with professional external mediators to mediate charges filed with EEOC. All EEOC mediators, whether internal staff or external mediators, are neutral unbiased professionals [who have] no stake in the outcome of the mediation process.

Id.

⁷¹ See *infra* Part IV.B.

⁷² Fawn H. Johnson, *Civil Rights Advocates Express Concerns About EEOC's New Mediation Program*, 67 U.S.L.W. 2456, 2456 (Feb. 9, 1999); see also *More Mediation*, *supra* note 11, at B5 (discussing reluctance of defense bar and corporations); THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, REMARKS BY VICE PRESIDENT AL GORE AND EEOC CHAIRWOMAN IDA L. CASTRO, at <http://www.eeoc.gov/mediate/transcripts.html> (last modified Feb. 11, 1999) (quoting Chairwoman Castro's remarks at the EEOC Mediation Program expansion ceremony).

⁷³ See *supra* notes 51–54 and accompanying text.

⁷⁴ Johnson, *supra* note 72, at 2456.

⁷⁵ *Id.* A panel of civil rights advocates met with EEOC Commissioner Paul Igasaki in February 1999 to discuss the expansion of the Mediation Program. *Id.* Carmen Joge, representative of the Hispanic advocacy group The National Council of La Raza, emphasized that an effort must be made beyond *individual* rights. *Id.* In the Hispanic community, according to Joge, individuals may be more motivated to bring charges if it will aid family and the community, rather than only the individual. *Id.* Likewise, Hilary Shelton, executive director of the Washington bureau of the NAACP, believes the EEOC

language barriers can separate the EEOC from some groups.⁷⁶ Activists claim that limited English proficiency restrains many individuals from pursuing charges.⁷⁷

To combat the language chasm, and to reach more members of historically disadvantaged groups, several potential solutions have been advanced. Information hotlines, workshops, audio-visual presentations, and the greater use of interpreters are possible responses.⁷⁸ The fairness of mediation and the adequate protection of individual rights are the foremost concerns of civil rights activists.⁷⁹ The employment of a diverse corps of well-trained mediators, in the eyes of some activists, can best ensure the

must reach out to religious leaders to properly serve the African American community. *Id.*

⁷⁶ *Id.* "Panelists also urged [the] EEOC to expand its outreach efforts to various 'undeserved communities,' particularly legal immigrants who may not speak English." *Id.*

⁷⁷ *Id.* Karen Narasaki, executive director of the National Asian Pacific American Legal Consortium, provided that "in many [Asian American] households, no one over the age of 13 can speak English." *Id.* Joge concurred, claiming difficulty with English is a major concern in the Hispanic community. *Id.* Most upsetting were situations in which complainants were unable to discuss their cases with an EEOC representative because the charging employee's accented English was incomprehensible to the EEOC representative. *Id.*

⁷⁸ *Id.* Chairwoman Castro has "invited advocacy organizations to work with the EEOC in providing legal advice and suggested setting up a 'hotline' for employees to consult experts regarding their rights." *Id.* Narasaki advised the EEOC "to conduct workshops in appropriate languages and hire bilingual investigators, mediators, and attorneys." *Id.* Furthermore, Narasaki claimed that partnerships with local community groups and television stations, as well as video and audio presentations, could act to effectively reach and educate non-English speaking communities. *Id.*

⁷⁹ Academicians have claimed that racial minorities and the economically disadvantaged are at risk when participating in mediation. Specifically, because the employer is likely to be more powerful, the formal litigation processes that protect against coercive dealings and ameliorate power disparities are missing. Yelnosky, *supra* note 29, at 606. "For example, according to Richard Delgado, the norms of fairness and adversariness in the judicial process serve both to counteract prejudice against racial and ethnic minorities and to strengthen the resolve of minority disputants to pursue their rights. Where those formal protections are absent, he claims, we can expect prejudiced disputants to act on their beliefs and minority parties to bend to their will." *Id.* (citing Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387-99). Yelnosky, while embracing the intuitive nature of Delgado's position, relates that there is no empirical support for the argument. *Id.* at 606-7. Conversely, some labor attorneys believe mediation is the appropriate venue for race discrimination cases so as to avoid a potentially racially prejudiced jury. Marcia Heroux Pounds, *Defusing Disputes*, FT. LAUDERDALE SUN-SENTINEL, Dec. 13, 1999, at A1.

continued protection of individual's rights.⁸⁰ Without question, the EEOC must make every effort to effectively serve the entire public. The activists must realize, however, that many of these concerns will continue to exist regardless of the use of ADR.

Chairwoman Castro has stated that the civil rights advocates raise a "natural concern."⁸¹ This concern, according to Castro, may be alleviated in a couple of ways. First, extensive training of mediators is important to ensure neutrality.⁸² Because many individuals do not fully understand their rights, the neutrality of the mediator is exceptionally vital.⁸³ Second, the EEOC has undertaken a greater effort to educate the public and provide guidance via the Internet.⁸⁴ Continued efforts to educate employees, employers, and mediators alike are required to ensure the continued success of the EEOC Mediation Program. Although the concerns raised by civil rights groups are not unfounded, there is not a direct correlation to the expanded use of mediation by the EEOC. In fact, because mediation has allowed more individuals to have their employment discrimination charges resolved with few negative consequences, the program, on balance, should be considered a success.

V. BENDING TO THE BUDGET

Although some parties believe that mediation is an inappropriate method of resolving employment disputes, financial realities are more likely to impede the continued growth of the EEOC Mediation Program. For FY 2000, the Clinton Administration had requested \$312 million be appropriated to the

⁸⁰ *New Nationwide*, *supra* note 7, at C-1; *see also* Hébert, *supra* note 68, at 450 (stating that the relationship shared by mediation participants and the mediator is foremost when determining the overall satisfaction of the mediation participants in an employment discrimination dispute).

⁸¹ *New Nationwide*, *supra* note 7, at C-1.

⁸² *Id.* Castro has stated that mediators from within the EEOC or from outside organizations will be fully trained, and will "truly function as neutrals." *Id.*

⁸³ Narasaki professed that many Asian Americans do not understand their options or the decisions of the mediator. Johnson, *supra* note 72, at 2456. Castro acknowledged the need for education and consultation to ensure charging parties are fully aware of their rights, but recognized that individual advocates would not be available in all cases because of funding realities. *Id.* This recognition heightens the need for well-educated and neutral mediators to ensure fair and appropriate decisions. *Id.*

⁸⁴ For example, in October 1999, the EEOC published guidelines in compliance with recent United States Supreme Court rulings on employer liability for sexual harassment by supervisors. THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SEX DISCRIMINATION GUIDELINES AND NATIONAL ORIGIN DISCRIMINATION GUIDELINES, at <http://www.eeoc.gov/docs/rescind.html> (last modified July 6, 2000).

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EEOC.⁸⁵ The final budget, however, only provided \$282 million—a scant \$3 million more than FY 1999.⁸⁶ Even though the Mediation Program had been an unequivocal success, Chairwoman Castro noted in December 1999 that cuts would likely be through a reduction in the number of external contract mediators, as this provided “one of the few areas of flexibility” when addressing funding shortfalls.⁸⁷

As January 2000 arrived, Chairwoman Castro had not yet decided to slash funding to the Mediation Program.⁸⁸ In February 2000, however, the ax fell. Although the internal mediation portion of the program was spared, the external Mediation Program was cut.⁸⁹ Chairwoman Castro stated that \$11 million was necessary to cover cost-of-living increases, and in light of fixed costs, the EEOC faced “a serious shortfall We don’t have much leeway.”⁹⁰ The cuts to the external Mediation Program obviously trim needed resources. Some parties, however, believe that sole reliance upon internal mediators undermines the entire Mediation Program.⁹¹

Of concern to employment attorneys is the inability of the EEOC to continue to expeditiously mediate claims, thus reducing the remaining backlog of cases.⁹² One attorney opined “[i]t is in no one’s interest to have

⁸⁵ BUDGET, *supra* note 26, at 137.

⁸⁶ Nancy Montwieler, *EEOC: More User-Friendly Commission Faces Tighter Budget Constraints*, 246 Daily Lab. Rep. (BNA), at C-1 (Dec. 23, 1999) [hereinafter *User-Friendly Commission*]. Chairwoman Castro spoke out against the reduced funding, stating that the appropriation “doesn’t even cover the cost of living,” and recognized the need to cut staffing and programs as a result. *Id.*

⁸⁷ *Id.*

⁸⁸ Lisa I. Fried, *A Budget Crunch May Cripple a New Program*, N.Y. L.J., Feb. 3, 2000, at 5. In an effort to continue the external Mediation Program, the EEOC offered an early retirement option to qualified employees; however, an insufficient number of individuals accepted the offer to allow for the external program to continue. Sixel, *supra* note 13, at 1.

⁸⁹ Sixel, *supra* note 13, at 1.

⁹⁰ *Id.* (quoting Chairwoman Castro).

⁹¹ See *infra* notes 96–99 and accompanying text.

⁹² Gary Friedman, a partner at Mayer, Brown & Platt, is also concerned by cuts to the Mediation Program: “The advantage to mediation is going to be lost or compromised to a degree because the small roster of people will not be able to get through these cases as expeditiously.” Fried, *supra* note 88, at 5. Recall, however, by comparison that some attorneys have questioned mediation as a method of resolution whatsoever. Cf. *Managing in the Millennium*, *supra* note 12, at 8.

cases linger without resolution.”⁹³ Unquestionably, the latest budget cuts will lessen the number of cases that are mediated during this year.⁹⁴

Also, some employers may be loath to elect mediation without external mediators, and those who do participate may question the internal mediator’s quality and fairness. Pro bono mediators may be recruited to fill the void, but this option is unattractive as a permanent resource. Allen Fagin, an employment attorney and partner at Proskauer Rose believes that “‘You get what you pay for I have concerns about the long range success of a program that should be compensating qualified people, but is turned into a volunteer program.’”⁹⁵

Furthermore, although the EEOC has taken precautions to “ensure the integrity of internal mediation,” erecting a “firewall” between mediators and investigators, many employers will not be comfortable using internal mediators.⁹⁶ Reasons cited by attorneys for favoring external or independent mediators is that they spend more time on each case,⁹⁷ and the perception of a higher level of fairness and objectivity.⁹⁸ Although few actively question the ability of the internal mediators, the balance provided by the external mediators seems crucial.

Finally, because the scope of the cuts is so large, employment attorneys on both sides of the bar may choose to mediate their claims through a private agency rather than with the EEOC.⁹⁹ If attorneys wish to mediate, and do not

⁹³ Fried, *supra* note 88, at 5.

⁹⁴ Chairwoman Castro conceded in December 1999 that cuts to the Mediation Program would “likely delay a goal of cutting the current backlog of about 40,000 discrimination charges to 28,000 by the end of Fiscal Year 2000 and to resolve new charges within 180 days. Those goals ‘will take a little bit longer now’” *User-Friendly Commission*, *supra* note 86, at C-1.

⁹⁵ Fried, *supra* note 88, at 5. Michael Bertty, the ADR coordinator at the EEOC District Office in New York, however, has claimed that if faced with cuts to the Mediation Program, he would actively recruit volunteers. *Id.*

⁹⁶ Sixel, *supra* note 13, at 1.

⁹⁷ *Id.* Bernie Middleton, an employment attorney with Provost & Humphrey in Houston believes the independent mediators have more time to carefully consider a case, while internal mediators face greater time pressures. Importantly, the loss of external mediators may only augment the pressures placed upon the internal mediators who remain. *Id.*

⁹⁸ *Id.* Ted D. Meyer, an employment attorney with Seyfarth, Shaw, Fairweather and Geraldson in Houston, testified before the EEOC during the fall of 1999. Meyer claimed that employers feel, in general, that the outside mediators were more objective. *Id.*

⁹⁹ Fried, *supra* note 88, at 5. Mr. Friedman adds: “‘This will stall their efforts to convince the parties that the EEOC is as effective at resolving disputes as the private organizations.’” *Id.*

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consider internal mediation acceptable, forcing them to go elsewhere, then the EEOC Mediation Program is effectively dead. Without the Mediation Program the backlog can only increase again,¹⁰⁰ and the Commission will fail to fulfill its mission.

VI. CONCLUSION

Before the EEOC Mediation Program was fully funded and initiated, the backlog of cases to be heard was staggering.¹⁰¹ The traditional methods of resolution, namely investigation and litigation, were too time consuming and could not efficiently resolve employment disputes.¹⁰² Since the EEOC increased the use of mediation, however, the backlog of cases has plummeted.¹⁰³

The expanded EEOC Mediation Program allowed for the successful resolution of more than 4,800 cases in FY 1999.¹⁰⁴ Regardless of this quantitative success, the Mediation Program continues to grow sporadically. Employers have chosen to employ the program only 36% of the time.¹⁰⁵ Also, civil rights groups continue to vigilantly watch the progress of the program.¹⁰⁶ Finally, the external component of the EEOC Mediation Program has been recently cut because of limited funding.¹⁰⁷

Unquestionably, the EEOC must continue to fully fund the Mediation Program, even if that funding comes at the expense of another program within the Commission. The continued concern of various civil rights groups, and the arguments proposed by those groups should not be discounted. The internal safeguards already in place, however, sufficiently serve to protect mediation participants against civil rights infringement. Furthermore, as the concerned activists continue their vigil, their watch is another effective

¹⁰⁰ As a point of comparison, within the year-end report for FY 1999, the EEOC claimed that pending cases were at a 15-year low *because* of the expanded Mediation Program. Glenn Burkins, *A Special News Report About Life on the Job and Trends Taking Shape There*, WALL ST. J., Dec. 28, 1999, at A1.

¹⁰¹ *More Mediation*, *supra* note 11, at B5.

¹⁰² *See supra* Part II (demonstrating the various inefficiencies of litigation and investigation).

¹⁰³ *More Mediation*, *supra* note 11, at B5.

¹⁰⁴ Burkins, *supra* note 100, at A1.

¹⁰⁵ *Integral Tool*, *supra* note 29, at 2184.

¹⁰⁶ *See supra* Part IV.B (discussing the possibility that civil rights may be infringed upon by the use of ADR in employment disputes).

¹⁰⁷ *See supra* Part V (focusing on the recent reduction of funding for external mediators).

safeguard. If the program is not funded, however, the glut of unheard cases will return. This result will paralyze the EEOC.

Congress must recognize the importance of the EEOC's mission. Thousands of new employment disputes are placed upon the Commission's ledger yearly; without continued funding increases, at least matching the cost-of-living index, the EEOC simply will not be able to perform its mission as required by law.

More directly, Chairwoman Castro and other policy makers at the EEOC must re-evaluate the recent reduction of the external Mediation Program. Thankfully, pro bono mediators continue to provide valuable services, but for what length of time? Although Chairwoman Castro believes funding for external mediators may return in next year's budget,¹⁰⁸ the solution is circular. As employers become increasingly familiar and comfortable with mediation as a method for solving employment disputes, the number of cases that require a full investigation will fall. Likewise, litigation costs will be reduced. Now is the time for investment in this program, not reduction. Perhaps funds may be reapportioned away from the traditional methods of resolution to fulfill the full scope of the Mediation Program. In response to this reduction, perhaps initially, the backlog of cases could rise. This increase, however, would be illusory; in time, the continued vigor of the Mediation Program will more than counter this adjustment.

Because the EEOC Mediation Program is fair, and because many more individuals have had their charges of employment discrimination resolved, the Mediation Program must be considered a success. Efficiency has joined hands with the increased acceptance of ADR as an appropriate method of resolving employment disputes, by employers and employees alike. The expanded program, however, must capitalize upon the momentum that has been built. The program must continue to be fully funded. If the funding is made available, ADR and mediation will continue to prove a panacea for the EEOC.

¹⁰⁸ Sixel, *supra* note 13, at 1. "Castro said she is pleased President Clinton is asking Congress to increase EEOC's funding next year so the external mediation portion could be restored." *Id.*